LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 21 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 572

JACK LEWIS COUSINS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

~~BRIEF OF PETITIONER~~

Office and Post Office Address:
1319 IBM Building
Seattle, Washington 98101

JOEL A. C. RINDAL

610 United Pacific Building
Seattle, Washington 98104

MALCOLM L. EDWARDS

Counsel for Petitioner

CRAFTSMAN-MET PRESS SEATTLE, WASHINGTON

SUBJECT INDEX

	Page
I. Citations To Opinions Below	1
II. Jurisdiction	2
III. Questions Presented	2
IV. Constitutional Provisions And Statutes Involved	3
V. Statement	5
VI. Reasons For Granting The Writ	14
Question A: Denial of Trial by Jury	14
Question B: Test of Materiality of Newly Discovered Evidence Under Federal Rules of Criminal Procedure, Rule 33	20
VII. Conclusion	21
Appendices:	
Appendix A Opinion of the United States Court of Appeals For The Ninth Circuit	A-1
Appendix B Order	A-4
Appendix C Order Staying Issuance of Mandate	A-5

TABLES OF AUTHORITY

Table of Cases

Adams v. U.S., 220 F.2d 297 (CA 5, 1955) 8

Bollenbach v. U.S., 326 U.S. 607, 66 S. Ct. 402, 90 L.ed. 350 (1946) 15-16

Brandon v. U.S., 190 F.2d 175 (CA 9, 1951) 17

Cleary v. U.S., 163 F.2d 748 (CA 9, 1947) 17

Delbridge v. U.S., 262 F.2d 710 (1958) 19

Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L.ed.2d 491 (1968), reh. den. 392 U.S. 947, 88 S. Ct. 2270, 20 L.ed.2d 1412 14-15

Griffin v. U.S., 336 U.S. 704, 69 S. Ct. 814, 93 L.ed. 993 (1949) 17, 20

	Page
Hawkins v. U.S., 324 F.2d 873, (CA 5, 1963)	19
Johnson v. U.S., 32 F.2d 127 (CA 8, 1929)	17
Mejia v. U.S., 291 F.2d 198 (CA 9, 1961)	17
Mesarosh v. U.S., 352 U.S. 1, 77 S. Ct. 1, 1 L.ed.2d 1 (1956)	17-18, 20
Turner v. Louisiana, 379, U.S. 466, 85 S. Ct. 546, 13 L.ed.2d 424 (1965)	15
U.S. v. Bailey, 277 F.2d 560 (CA 7, 1960)	7
U.S. v. Costello, 255 F.2d 876 (CA 2, 1958) cert. den. 78 S. Ct. 1385, 357 U.S. 937, 2 L.ed.2d 1551	17
U.S. v. Miller, 411 F.2d 825 (CA 2, 1969)	19
Wolcher v. U.S., 233 F.2d 748 (CA 9, 1956), cert. den. 77 S. Ct. 61, 352 U.S. 839, 1 L.ed.2d 56	17

Constitutional Provisions

United States Constitution, 6th Amendment	13, 14, 15, 16, 19, 20
United States Constitution, 14th Amendment	14, 16

Statutes

18 U.S.C. §3231	2
21 U.S.C. §174	3, 4, 5
26 U.S.C. §4704(a)	3, 4-5, 7
28 U.S.C. §1254(1)	2

Textbooks

2 Wright, *Federal Practice and Procedure* 515, §357	16-17

Rules

Federal Rules of Criminal Procedure, Rule 33	2, 3, 18, 20, 21
Supreme Court Rules, Rule 19 and 22	2

IN THE

Supreme Court of the United States

October Term, 1970

No. .....

JACK LEWIS COUSINS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER

Jack Lewis Cousins prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled cause on June 17, 1970, and the Order Denying Petition for Rehearing entered on July 21, 1970.

I.

CITATIONS TO OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals printed in Appendix A hereto, *infra*, page A-1, is reported in ..... F.2d .....

II.
JURISDICTION

A petition for rehearing was timely filed. Rehearing was denied on July 21, 1970 by order printed in Appendix B hereto, *infra*, page A-4. The Stay of Mandate issued on July 31, 1970 is printed in Appendix C, *infra*, page A-5. Jurisdiction was conferred upon the court of first instance, the United States District Court for the Western District of Washington, Northern Division, under the provisions of *Title 18, U.S. Code, §3231*. The jurisdiction of this court is invoked under *Title 28, U.S. Code, §1254(1)*, and *Rules 19 and 22*.

III.
QUESTIONS PRESENTED

A. Whether an accused is denied the right to have his guilt or innocence determined by a jury when:

(1) Evidence is discovered after trial which was not available to the accused by the exercise of diligence before trial, and

(2) The newly discovered evidence is of a type that it would be *dogmatic* to say that a jury *could not* under the facts of the case regard the evidence as sufficient to raise a reasonable doubt as to the guilt of the accused, and

(3) The accused is denied a new trial because a judge (not a jury) determines as a matter of fact "that no *acquittal* would be *likely* to result" from the new evidence along with that which was produced at the trial of the accused.

B. Whether an accused is entitled to a new trial under the *Federal Rules of Criminal Procedure, Rule 33*, when the evidence discovered after trial is of sufficient materiality that the decision of the jury might reasonably be to acquit

but not of sufficient weight to cause a judge to believe that the jury would more likely than not acquit—i.e., must newly discovered evidence be of sufficient weight to convince a judge to acquit or only of sufficient weight that a reasonable jury might consider the evidence material to the jury's determination of the guilt or innocence of the accused?

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provision involved is the *Sixth Amendment to the Constitution of the United States*. The rule involved is *Rule 33*, of *Federal Rules of Criminal Procedure*. The statute defining the crimes of which petitioner was convicted are *Title 21, U.S. Code*, §174 and *Title §26, U.S. Code, §4704(a)*. Each of the authorities is printed hereafter:

> "*AMENDMENT VI*—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

> "*Rule* 33. NEW TRIAL.
>
> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a